CITY AND COUNTY OF SAN FRANCISCO

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November 28, 1997

Magalie Roman Salas, Secretary
Federal Communications Commission
1919 M. Street, N.W., Room 222
Washington, D.C. 20554

Re: MM Docket No. 97-182
In the Matter of Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities

Dear Magalie Roman Salas:

Enclosed please find an original plus nine copies of Reply Comments to be filed in this proceeding on behalf of the City and County of San Francisco.

Please distribute a copy to each Commissioner. Thank you.

Very truly yours,

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:

Preemption of State and Local Zoning and Land Use Restrictions on the Siting, Placement and Construction of Broadcast Station Transmission Facilities	))))	MM Docket No. 97-182

REPLY COMMENTS
OF THE CITY AND COUNTY OF SAN FRANCISCO

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INTRODUCTION

The City and County of San Francisco (the City) submits these reply comments in response to the Commission's Notice of Proposed Rule Making (NPRM) regarding preemption of local zoning, land use and other laws affecting broadcast facilities.

The opening comments filed by broadcast industry representatives (Broadcast Comments) identify two legitimate concerns. First, like other businesses, broadcasters should be able to obtain determinations from local and state governments -- whether approval or disapproval -- in a reasonable period of time. Second, while land use, aesthetic, environmental and health and safety issues must be responsibly addressed, irrational "Not In My Backyard" (NIMBY) politics should not prevent the siting of broadcast facilities.

Although these are legitimate concerns, the City urges the Commission to reject the Proposed Rule. The Proposed Rule is neither necessary nor well tailored to respond to these concerns.

The Proposed Rule only addresses the symptoms of local opposition, not its causes. Adoption of the Proposed Rule will not change the fact that many people consider broadcast towers to be bad neighbors that create a blight on vistas cherished by local citizens. Steamrolling local opposition will only frustrate citizens and intensify their opposition. Further, adoption of the Proposed Rule will only shift the conflicts around facility siting and construction to the Commission and the courts. The local review process creates an opportunity to air community concerns, identify ways to mitigate the disfavored effects of large facilities, and consider alternative sites for such facilities. Neither the Commission nor the courts are better equipped than local officials to make determinations about proposals to site large facilities.

The Commission should reject the Proposed Rule for five reasons:

First, the Proposed Rule exceeds the scope of the authority delegated to the Commission by Congress. The City can find no evidence that *any* federal agency has ever asserted authority to broadly preempt state and local police power over the siting of facilities, (including, for example, hazardous waste disposal sites and power plants) merely because the agency identifies a federal interest in facilities that may face local opposition.

Second, even if the Commission has jurisdiction to adopt the Proposed Rule, the record does not demonstrate that the Proposed Rule is necessary.

Third, the Proposed Rule sacrifices the public interests in protecting health and safety and controlling community development and its impact on the environment. State and local requirements designed to serve these public interests do not duplicate federal regulations and cannot be reduced to NIMBYism.

Fourth, the Commission's self-certification scheme for regulating compliance with the Commission's standards for human exposure to RF emissions should not displace state or local compliance monitoring.

Finally, the Commission could take alternative actions that would more effectively facilitate the deployment of digital broadcasting without triggering years of litigation by purporting to preempt historic state and local police powers. The City urges the Commission to abandon the Proposed Rule and pursue these alternatives.

ARGUMENT

1. THE COMMISSION DOES NOT HAVE AUTHORITY TO ADOPT THE PROPOSED RULE.

The Proposed Rule would preempt state and local laws that present an obstacle to the rapid implementation of DTV service or the "institution and improvement of radio and television broadcast service generally." NPRM ¶1. Nothing in the Broadcast Comments remedies the fundamental problem with the proposal: this unprecedented preemption far exceeds the scope of the Commission's congressionally delegated authority.

As the City discussed in its Opening Comments, the Supreme Court has soundly rejected arguments that the FCC may "take action which it thinks will best effectuate a federal policy." *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 374 (1976). Instead, the appropriate inquiry is "whether Congress intended that federal regulation supersede state law." *Id.* at 369. Neither the Communications Act nor the Balanced Budget Act provide the necessary "clear and manifest" Congressional intent to preempt state and local police powers over the siting and construction of broadcast facilities.[1]

Further, the proposed preemption far exceeds the scope of any ostensible federal interest identified by the NPRM. Courts have consistently required the Commission to bear the "burden . . . of showing *with some specificity* that [the state and local laws] would *negate* the federal policy . . . ." *National Ass'n. of Regulatory Utility Comm'rs. v. FCC*, 880 F.2d 422, 430 (D.C. Cir. 1989) (NARUC v. FCC) (emphasis added); *California v. FCC*, 905 F.2d 1217, 1243 (9th Cir. 1990), *cert. denied* 514 U.S. 1050 (1995). With a record based on unverified anecdotal

[1] *See* City's Opening Comments, pp. 20-27.

evidence from a handful of jurisdictions, the Commission cannot carry its burden of demonstrating "with some specificity" that state and local laws governing the siting and construction of broadcast facilities would "negate" the federal interest in rapid deployment of DTV.

Finally, the Commission must "narrowly tailor" any preemption to address *only* those state or local laws that "would *necessarily* thwart or impede" the Commission's goals. *NARUC v. FCC*, 880 F.2d at 430 (emphasis added); *California v. FCC*, 905 F.2d at 1243. As the Ninth Circuit has explained:

> The FCC may not justify a preemption order merely by showing that *some* of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC has the burden of justifying its *entire* preemption order by demonstrating that the order is *narrowly tailored* to preempt *only* such state regulations as would negate valid FCC regulatory goals.

California v. FCC, 905 F.2d at 1243 (emphases added). The Proposed Rule is hardly narrowly tailored. It covers all broadcast facilities, not just DTV facilities. It eliminates from local consideration land use and aesthetic criteria on which all other construction proposals may be evaluated. It truncates the time for local decision so dramatically as to undermine basic health and safety reviews and to eliminate environmental review. Such broad preemption reverses the regime of concurrent federal, state and local jurisdiction over broadcast facilities that is dictated by the federalist principles of our Constitution.

2. THE RECORD FAILS TO ADEQUATELY SUPPORT PREEMPTION.

As discussed in the City's Opening Comments, the broad and sweeping preemption of state and local governments by the Proposed Rule represents an extraordinary incursion into the police powers reserved to the states by the Tenth Amendment. The NPRM poses a

number of questions to identify whether preemption is necessary and desirable. NPRM ¶17. In particular, the NPRM inquires whether the examples of tower-siting difficulties cited in the NAB petition are representative of radio and television broadcast industry tower siting experiences generally. NPRM ¶19.

The Broadcast Comments fail to support sweeping preemption. As the Commission noted, there are more than 13,000 radio and television broadcasters licensed to operate throughout the country. NPRM ¶16. Given this enormous number of licensees, the evidence provided in Broadcast Comments is sparse. These comments cite fewer than 40 instances in which irrational procedures or foot-dragging by local officials are alleged to have unreasonably delayed the siting of various facilities.

Like the examples cited in the Petition, most of the complaints provided by Broadcast Comments are based on unsworn statements from unidentified sources who speculate about the reasons for slow processing of permits or permit denials.[2] Because the Commission has not required Broadcast Comments to be served on the communities cited, the accuracy of industry assertions has not been subject to any form of cross examination and cannot be verified from the record.

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[2] *See* Joint Comments of The Named State Broadcaster Associations; Comments of KSKY; Comments of Communications Facilities, Inc; Comments of Sima Birach; Comments of Florida Sportstalk Inc; Comments of Fant Broadcasting Co.; Comments of The Cromwell Group, Inc.; Comments of Champlain Valley Telecasting, Inc.; Comments of Sounds of Service Radio, Inc.; Comments of The Lee Broadcast Group; Comments of WFLU, Inc.; Comments of Freedom, Communications, Inc.; Comments of Goetz Broadcasting Corporation; Comments of Butterfield Broadcasting and the Growing Christian Foundation; Comments of Radio Property Ventures; Comments of Norman Broadcasting Company, Inc.; Comments of WFTC(TV); Comments of New Mexico Broadcasting Company; Comments of The Association of America's Public Television Stations and the Public Broadcasting Service; Comments of Children's Broadcasting Corporation; Comments of Boston University Communications, Inc.; Comments of The Board of Regents of the University of Wisconsin System; Comments of Polnet Communications, Ltd..

More telling, many Broadcast Comments predict insurmountable hurdles from state and local review yet do not cite a single specific example of difficulty.[3] Furthermore, virtually none of the examples involve digital television. As a result, none of the local officials whose actions are described were acting in a context affected by federally imposed deadlines for broadcast applicants. Even if they are entirely accurate, the examples cited cannot be relied on to predict local decision-making where the implementation of a significant new technology is involved and where local officials have a direct interest in rapid return of spectrum for public safety uses.

Finally, none of the Broadcast Comments provide *any* information about what -- if anything -- broadcasters have done to advise local officials about their plans for the transition to digital television. None of the Broadcast Comments report on any efforts to work *with* local officials or to accommodate the legitimate public interest in minimizing the impact of unsightly and potentially hazardous facilities on community development.

Some Broadcast Comments suggest that the Commission should amplify the obviously scanty record by importing the record from other proceedings concerning personal wireless service facilities and receive-only satellite dishes.[4] This suggestion is ridiculous. Broadcast

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[3] *See* Comments of Beaverkettle Company; Comments of Susquehanna Radio Corp.; Comments of The New York Times Broadcasting Service Inc.; Comments of McGraw-Hill Broadcasting Company, Inc.; Comments of Ohio Educational Telecommunications; Comments of the South Carolina Broadcasters Association; Joint Comments of Paxson Communications Corporation, Cox Corporation, Inc. and Media General, Inc.; Comments of Golden Orange Broadcasting Co., Inc; Comments of The American Radio Relay League, Incorporated; Comments of KOIN; Comments of WLEX-TV, Inc.; Comments of Apple Valley Broadcasting, Inc., Queens Radio, Inc., Spokane Radio, Inc., Spokane Television, Inc., and Television Wisconsin, Inc.; Comments of Univision Communications Inc.; Comments of The California Broadcasters Association; Comments of WDTV; Comments of A.H. Belo Corporation; Comments of The Association of Local Television Stations, Inc.; Comments of the Alabama Broadcasters Association; Comments of the New Jersey Broadcasters Association; Comments of Hubbard Broadcasting, Inc.; Comments of American Tower System, Inc..

[4] *See, e.g.*,. Comments of The National Association of Broadcasters and The Association For Maximum Service Television, pp. 20-21; Comments of the American Radio Relay League, Incorporated, pp. 2-5; Comments of the

facilities are typically immense. Like any immense structure, a broadcast tower can create significant health and safety hazards and significant aesthetic and environmental effects. Comparing broadcast towers to receive-only satellite dishes is liking comparing apples to bicycles.

Finally, the record demonstrates that *many* issues make it difficult for broadcasters to meet the Commission's deadlines. Giving broadcasters special exemption from local laws and procedures is neither wise nor useful in response to these obstacles. For example, many Broadcast Comments lament the difficulty of finding qualified crews to construct broadcast towers. One Broadcast Comment complains that construction of a replacement tower was delayed because the contractor hired to build the tower was not licensed in West Virginia. Construction was delayed for several months while the contractor took the licensing exam and awaited the results. The company argues that preemption of state licensing requirements is necessary to meet the Commission's deadlines.[5] This complaint illustrates the potential breadth of the Proposed Rule -- and its potential effect on public safety. Truncating local review of structural safety in this context is hardly wise policy.

The Six Month Progress Reports on DTV Implementation filed with the Commission on November 1, 1997 identify another obstacle that is beyond the control of local governments: the Commission's failure to act on requests for reconsideration of the DTV allocation tables.[6] Under the logic of the Proposed Rule, these requests for reconsideration

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New Jersey Broadcasters Association, p.4; Comments of Children's Broadcasting Corporation, pp. 8-10; Comments of Fordham University, pp. 5-7.

[5] *See* Comments of New Mexico Broadcasting Co., pp.2-3.

[6] *See* FCC 97-116, Fifth Report and Order in the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, ¶ 76.

should be deemed granted because they have been on file with the Commission for more than 45 days. Of course, such a result would lead to chaos in the use of the radiofrequency spectrum. Allowing a "deemed approved" rule to create such a result would abrogate the Commission's responsibility to the public. Applying the Proposed Rule to the Commission's own proceedings illustrates that it is much easier to identify factors that may delay implementation of digital television than to identify solutions that do not sacrifice important public interests. As discussed below, the Proposed Rule fails to identify reasonable and practical solutions.

3. UNIFORM NATIONAL DEADLINES FOR LOCAL ACTION WOULD JEOPARDIZE CRITICAL LOCAL FUNCTIONS THAT DO NOT DUPLICATE COMMISSION REGULATIONS.

The Commission has asked whether it should preempt state and local governments for failing to act within a specified time period and seeks comments on the duration of local permitting requirements tied to zoning and land use approvals. NPRM ¶¶ 18, 19. The Commission also asks whether the time periods proposed by the NAB are reasonable or whether 90 days would be more realistic for broadcast tower applications. NPRM ¶23.

Broadcast Comments urge adoption of the proposed deadlines, and urge their application to all broadcast facilities, not just digital television facilities. The City agrees that broadcasters should be able to expect that permit applications will be handled within a reasonable period of time. However, neither the deadlines proposed by the National Association of Broadcasters nor the longer deadline proposed by the Commission are reasonable. No uniform deadlines can be adopted without jeopardizing public health and safety, interfering with coherent development planning at the local level, and interfering with

the Constitutional rights of citizens. The proposal to adopt uniform national deadlines should be rejected for two reasons.[7]

First, the record demonstrates that the definition of a reasonable period of time will vary widely among different jurisdictions.[8] Contrary to the implication of the Broadcast Comments, local officials do not have unfettered discretion to endlessly delay consideration of permit applications. In San Francisco, state and local laws set deadlines for review of permit applications *and* establish required public notice and hearing periods. For example:

> Building Permits: The San Francisco Department of Building Inspection must issue or deny a building permit by deadlines that vary according to the cost of the construction and the kinds of review required. Projects with the greatest value must generally be approved or denied within 120 days. San Francisco Building Code, § 106.3.7. Any interested person may appeal the issuance or denial of a building permit to the Board of Appeals within 15 days. San Francisco Charter, §4.106. A decision on the appeal must be issued within 60 days of its filing. San Francisco Municipal Code, Part III, §8. A decision of the Board of Appeals becomes final within 90 days unless a party to the appeal seeks judicial review.
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> Land Use Approval. With minor exceptions, broadcast facilities may be installed in the City as of right on property zoned for commercial or industrial use. San Francisco Planning Code §227(h)&(i). Where a Conditional Use Permit is required, the City's Planning Commission must conduct a public hearing within a reasonable time of the filing of a complete application. S.F. Planning Code §306.2. The public must be given at least 20 days notice of the hearing. S.F. Planning Code §306.3. The Planning Commission must render a decision on the application within 90 days of the conclusion of the public hearing. §306.4(d). Under state law, the Planning Commission must reach a decision within 180 days of the filing of a complete application. Cal. Gov. Code §65952. The Planning Commission decision becomes final in 30 days if it is not appealed to the City's Board of Supervisors. S.F. Planning Code §308.1(b). If an appeal is taken, the Planning Commission decision becomes final if it is not reversed by the Board of Supervisors within 90 days.

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[7] As discussed in the City's opening comments, adoption of uniform national deadlines would conflict with Congressional treatment of the siting of personal wireless service facilities. Congress concluded that adopting uniform national standards would not be an appropriate way to ensure that state and local decision-makers act within a reasonable period of time because it would not take into account "the nature and scope of each request." H. Rep. No. 458, 104th Congress, 2d Sess. 207-209 (1996). Instead, Congress concluded that a reasonable period of time should be "the usual period under such circumstances" in each jurisdiction. *Id.*

[8] *See, e.g.*, Comments of the National League of Cities and the National Association of Telecommunications Officers and Advisors, pp. 9-10.

Environmental Review. There are a variety of deadlines governing local action under the California Environmental Quality Act. Where an environmental Impact Report must be prepared, it must be completed within one year of the date the application for environmental review is determined to be complete. Cal. Pub. Res. Code §21100.2, §21151.5. During this time, there are several requirements for notice and public hearing. See, e.g. Cal. Pub. Res. Code 21080.4(a), §21092, §21091(a).

Municipal commenters indicate that similar constraints govern local review of permit applications in other jurisdictions.[9] These deadlines and required public notice and hearing requirements are rules of general application that have been developed to *balance* the interests and Constitutional rights of project developers and members of the public. Imposing uniform national deadlines will force the City to choose between disregarding the requirements of state and local law or disregarding the Commission's rules.[10]

Second, the proposed uniform national deadlines would threaten to eliminate local environmental review in those states where it is required. Broadcast Comments claim that state and local environmental review duplicates the Commission's environmental review under NEPA.[11] The environmental review that San Francisco is required to perform under the California Environmental Quality Act (CEQA, Cal. Pub. Res. Code § 21000 *et seq.*) differs significantly from the Commission's requirements under NEPA.

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[9] *See, e.g.,* Comments of the City of Chicago, pp. 29-33; Comments of Jefferson County, Colorado, pp. 5-7; Comments of the Commonwealth of Massachusetts, pp. 9-11; Comments of the City of Philadelphia, pp. 5-8; Comments of the State of Vermont Environmental Board, pp. 8-12.

[10] As discussed in the City's opening comments, uniform national deadlines would also force local officials to adopt the Commission's priorities, in violation of of the Tenth Amendment. Broadcast towers are not the only important facilities requiring review by local officials. For example, in addition to Sutro Tower modifications, San Francisco's Office of Environmental Review is currently reviewing 143 projects, including a new Municipal Railway route, watershed management plans, reuse plans for the Hunter's Point Shipyard and Treasure Island, expansion of Moscone Center, reconstruction of the San Bruno Jail, a new stadium and shopping center complex for the San Francisco 49ers, and a master plan for Golden Gate Park. The Commission cannot set priorities for review of these projects by local officials.

[11] *See, e.g.,*. Comments of Fant Broadcasting Co., pp. 6-7; Comments of The National Association of Broadcasters and The Association For Maximum Service Television, pp. 14-15.

CEQA establishes the state's commitment to "[t]he maintenance of a quality environment for the people of this state now and in the future." Cal. Pub. Res. Code § 21000(a). As part of this commitment, CEQA requires all state and local agencies, boards and commissions to prepare an environmental impact report (EIR) on any project which may have a "*significant effect*" on the environment. § 21100; § 21151; *see also Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247 (1972).

Examples of "significant effects" on the environment under CEQA include whether the project will: conflict with the adopted environmental plans and goals of the community where it is located; have a substantial demonstrable negative aesthetic effect; induce substantial growth or concentration of population; cause an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system; displace a large number of people; expose people or structures to major geologic hazards; disrupt or divide the physical arrangement of an established community; create a potential health hazard or involve the use, production or disposal of materials which pose a hazard to people or animal or plant populations in the area affected; conflict with established recreational educational, religion or scientific uses of the area; convert prime agricultural land to non-agricultural use or impair the agricultural productivity of prime agricultural land; interfere with emergency response plans or emergency evacuation plans.[12] Cal. Admin. Code, Title 14, §§ 15000 *et seq.*

[12] Additional "significant effects" include whether the project will: substantially degrade water quality; contaminate a public water supply; substantially degrade or deplete ground water resources; interfere substantially with ground water discharge; encourage activities which result in the use of large amounts of fuel, water, or energy; use fuel, water or energy in a wasteful manner; increase substantially the ambient noise levels for adjoining areas; cause substantial flooding, erosion or siltation; extend a sewer trunk line with capacity to serve new development; violate any ambient air quality standard, contribute substantially to an existing or projected air quality violation, or expose sensitive receptors to substantial pollutant concentrations.

By contrast, under the Commission's interpretation of NEPA guidelines, actions which have a significant environmental effect are only those actions that may affect: officially designated wilderness areas or wild life preserves; threatened or endangered species or designated critical habitats; historical sites listed or eligible for listing in the National Register of Historic Places; Indian religious sites; 100 year flood plains; and significant changes in surface features (such as wetland fills, deforestation or water diversion). *See* 47 CFR § 1.1307. Under the Commission's rules, the only "significant effect" that reflects local interests is whether a structure located in a residential neighborhood will be equipped with high intensity white lights. *Id.*

The uniform national deadlines in the Proposed Rule would make it impossible for the City to carry out its duties under CEQA and would leave many important environmental effects unexamined. When combined with its effects on the City's ability to analyze compliance with basic health and safety requirements under the San Francisco Building Code (See City's Opening Comments at pp. 8, 12), the Proposed Rule's deadlines jeopardize the health, safety and welfare of the citizens of the City. The City agrees with the City of Philadelphia's recommendation that if the Commission adopts a rule that usurps state and local police power over the construction and siting of broadcast facilities, it should expressly require broadcasters and tower owners to indemnify state and local governments and their citizens for any damage caused by the erection, presence, and/or failure of a broadcast facilities.[13]

[13] *See* Comments of the City of Philadelphia, p. 9.

4. THE COMMISSION SHOULD NOT INTERFERE WITH LOCAL AUTHORITY TO MONITOR BROADCASTERS' COMPLIANCE WITH THE COMMISSION'S STANDARDS FOR HUMAN EXPOSURE TO RF EMISSIONS.

The Commission asks whether it should preempt state and local restrictions regarding exposure to RF emissions from broadcast transmission facilities. NPRM ¶22. The Petition and Broadcast Comments argue that such preemption is appropriate even though the Commission's regulatory scheme governing human exposure to RF emissions is based entirely on "broadcast diligence and self-certification."[14] The NAB argues that this self-certification scheme is adequate because "broadcasters take their self-certification extremely seriously" and because misrepresentation "is treated by the Commission as a very serious offense which can lead to fines or, possibly, loss of license..." *Id.* The NAB notes that the self certification system "has worked well for a number of years."

The City takes little comfort from the asserted diligence of the broadcast industry for three reasons. First, as discussed in the City's opening comments, during those years when the Commission's self-certification system was supposedly working well, an inspector for the City's Department of Public Health measured an RF hot spot *on a public street* in the residential neighborhood surrounding Sutro Tower.[15] The Commission's self-certification system does nothing to protect the public from hazards created by such hot spots. Furthermore, unlike the City of San Francisco, the Commission has no direct access to on-site information about whether, for example, fencing that is *essential* to Sutro Tower's ability to comply with the Commission's RF exposure standards is, in fact, in place.

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[14] *See* Comments of the National Association of Broadcasters and the Association for Maximum Service Television at p. 13.

[15] *See* City's Opening Comments at p. 20 and Declaration of Richard Lee.

Second, although *willful or repeated* failure to comply with license conditions may subject broadcast licensees to sanctions, 47 C.F.R. §1.80, willful misstatements are not the City's only, or even primary, concern. Good-faith mistakes and failure to recognize changed conditions that affect compliance are of equal concern where health and safety are at stake.

Unlike the Commission, the City is entrusted with performing many regulatory functions aimed at protecting the public health and safety. These regulatory schemes do not typically presume that businesses are complying with critical health and safety requirements and rely solely on self-certification by interested parties. For example, the City licenses restaurants that are obliged by law to conduct business in a manner conforming with the City's Health Code. The City does not rely on the assurances of proprietors and the City's ability to revoke the license of a restaurant failing to meet required standards. The City conducts inspections to confirm that restaurants are operated in a manner that *continues* to comply with applicable health and safety standards. There is no reason to exempt broadcasters from similar compliance monitoring -- *especially* when the Commission is pushing them to construct facilities very rapidly.

Finally, as part of its environmental review obligations under CEQA, if a proposed project will have significant effects on the environment, San Francisco is required to evaluate alternatives. Where alternative sites create different levels of risk for exposing humans to RF emissions that exceed the Commission's standards, local officials should be permitted to favor sites creating the lowest risk.

5. THE COMMISSION CAN FACILITATE LOCAL REVIEW OF PROPOSALS REGARDING BROADCAST TRANSMISSION FACILITIES WITHOUT PREEMPTING STATE AND LOCAL AUTHORITY.

The Commission has asked whether there is an appropriate role for the Commission in resolving disputes between localities and licensees with respect to tower siting issues. The Commission has further asked what role the Commission should play -- be it arbitrator, mediator or provider of a forum for suggestions. NPRM ¶23. The Proposed Rule would have the Commission arbitrate disputes based on detailed factual and legal records about which the Commission has no expertise.

The City urges the Commission to reject this role. Instead, the City sees four useful roles the Commission could play to facilitate local decision-making.

First, the Commission should make its technical staff available to answer questions from local officials who are reviewing applications regarding broadcast facilities. In some instances, technical questions within the scope of the Commission's expertise become important as local officials consider ways to mitigate undesirable features of a permit applicant's proposal. Indeed, broadcast applicants often inform local officials that certain aspects of their application reflect Commission *requirements*. For example, where a permit applicants seeks authority to construct a facility exceeding local height limitations, Commission staff could help local officials evaluate whether the requested height is actually technically or legally required.

Second, the Commission should make its staff available to provide technical advice to local officials seeking to promote collocation and to minimize the construction of unnecessary facilities. Currently, local officials seeking to minimize unnecessary construction must rely on technical representations by self-interested parties or seek expensive and time-consuming

review by hired experts. Many local authorities would welcome neutral technical expertise from Commission staff to determine when and where collocation is possible.

Third, the Commission should examine how its own rules can better facilitate and encourage collocation. The comments of both WFTC(TV) in Minneapolis, MN (WFTC) and Champlain Valley Telecasting, Inc. (Champlain Valley) indicate that broadcasters may experience significant delays *caused by other broadcasters* who are unwilling to share land or tower space uniquely appropriate for transmission of television signals. Both commenters propose expansion of the Commission's "Unique Site Rule" found at 47 C.F.R. §73.635. The Unique Site Rule provides that a television license will not be granted or renewed for any person owning, leasing or controlling a "unique" broadcasting site in a manner unduly restrictive of competition among television stations. WFTC and Champlain Valley request that the Unique Site Rule be expanded to apply at all times, not only when a broadcaster is seeking renewal of its license. [16] The Commission should consider the addition or modification of other rules to ensure that broadcasters and owners of existing towers cannot take advantage of the market forces created by the Commission's DTV rules to prevent efficient use of existing facilities.

Fourth, the Commission should require every broadcaster to file a DTV Transition Plan with local planning officials in every jurisdiction where the transition to digital television is expected to require modifications of existing broadcast facilities or construction of new facilities. Owners of existing broadcast towers who are not licensees should also be required to

[16] WFTC notes that it has faced some local obstacles to constructing broadcast facilities, but states that, despite these obstacles, "an industry-oriented approach is the best method to achieve the Commission's goals of making digital television a reality. The Commission should provide broadcasters with the tools to negotiate a mutually-beneficial solution that avoids Commission oversight of local regulation." Comments of WFTC at 6.

submit a DTV Transition Plan describing how the operation of the facility will change as a result of the transition to digital television. In light of the Commission's schedule for DTV service, the City suggests that following schedule for the submission of DTV Transition Plans:

Date Due	Licensees
1. February 1, 1998	Stations affiliated with ABC, CBS, Fox and NBC in the ten largest television markets and owners of tower facilities in the ten largest television markets
2. April 1, 1998	Stations affiliated with ABC, CBS, Fox and BBC in the top 30 television markets and owners of tower facilities in the top 30 television markets, not including the ten largest markets
3. January 1, 1999	All other commercial stations and tower owners
4. January 1, 2000	All non-commercial stations

Each station proposing to construct new facilities should be required to identify all existing broadcast facilities within a specified radius and to explain why digital transmission for the station cannot be provided from any such existing facilities.

Finally, the Commission should continue its long-standing policy of granting extensions to licensees who encounter difficulties with siting facilities in particular communities. This Commission has reiterated this policy in several of its digital television orders in MM Docket No. 87-268. As the Commission has noted, the existing rules governing extensions of time "should provide reasonable and effective relief in extenuating circumstances, including local zoning problems and difficulties in obtaining an appropriate site."[17]

[17] In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, Third Report &Order, n.43; *See also,* Second R&O, ¶ 27, Third R&O, ¶77.

CONCLUSION

For all the reasons discussed in the City's opening comments and in these reply comments, the City and County of San Francisco respectfully requests that the Commission reject the National Association of Broadcasters' Proposed Rule to preempt state and local authority over the construction and siting of broadcast facilities.

Respectfully Submitted by:

JULIA M.C. FRIEDLANDER
Deputy City Attorney

November 28, 1997